No. 14-981

Supreme Court, U.S.
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In The
Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE OF GAIL HERIOT AND PETER N. KIRSANOW, MEMBERS OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Fifth Circuit err in holding the University of Texas's ("UT's") race-preferential admissions policy to be narrowly tailored to confer the pedagogical benefits of diversity on all its students?

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IDENTITY AND INTEREST OF AMICI CURIAE

Gail Heriot and Peter Kirsanow ("Amici") are two members of the eight-member U.S. Commission on Civil Rights. Members are part-time appointees of the President or of Congress. This brief is being filed in Amici's individual capacities as private citizens.[1]

The Commission was established pursuant to the Civil Rights Act of 1957, P.L. 85-315, 71 Stat. 634 (1957). One of the Commission's core duties isvto gather evidence on issues and make recommendations to Congress, the President and the American people. As then-Senate Majority Leader Lyndon Johnson put it, the Commission's task is to "gather facts instead of charges"; "it can sift out the truth from the fancies; and it can return with recommendations which will be of assistance to reasonable men."[2]

The Commission, with Amici's support, has released two reports examining the empirical research on the failure of race-preferential admissions policies. This research indicates that students who attend schools where their entering academic credentials put

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[1] Pursuant to the Court's Rule 37.3(a), all parties have consented to the filing of this brief by filing blanket consents with the Clerk. Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund this brief's preparation or submission. No person other than Amici or their counsel made a monetary contribution to its preparation or submission.

[2] 103 Cong. Rec. 13,897 (1957) (statement of Sen. Johnson).

them towards the bottom of the class are less likely to succeed than similarly-credentialed students attending schools where their academic credentials more closely "match" the typical student's. If this research on "mismatch" is correct, race-preferential admissions policies are working to their supposed beneficiaries' detriment rather than to their benefit.

The first such report was *Affirmative Action in American Law Schools* (USCCR 2007), in which the Commission examined mismatch evidence in the legal education context. That research concludes that students, regardless of race, are less likely to graduate from law school and pass the bar if they are the beneficiaries of preferential treatment in admissions than if they attend a school where their entering academic credentials are like the average student's.

The second report, *Encouraging Minority Students to Pursue Science, Technology, Engineering, and Math Careers* (USCCR 2010), examined mismatch evidence indicating that students who attend schools where their entering academic credentials put them in the bottom of the class are less likely to follow through with an ambition to major in science or engineering than similarly-credentialed students who attend schools where their credentials put them in the middle or top of the class.

Amici believe that they are in a special position to inform the Court about this research and to discuss how it fits in with the case law on narrow tailoring.

SUMMARY OF ARGUMENT

One important function of the narrow tailoring prong of the strict scrutiny test is to smoke out insincerity. If a policy is not narrowly tailored to serve its alleged compelling purpose, then there is an excellent chance that it was not intended for that purpose.

In applying the narrow tailoring requirement to race-preferential admissions policies, courts must take a tough-minded, independent look at whether those policies are narrowly tailored to reap the pedagogical benefits of diversity for all students. *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) ("*Fisher I*"). If on close examination a policy appears to be tailored to achieve some other goal instead, then it must fall.

Alas, no tough-minded, independent look at UT's race-preferential admissions policy was undertaken on remand. The Fifth Circuit's decision is thus inconsistent with *Fisher I*. Had *Fisher I* been followed, it would have been obvious that UT's claim of being motivated by a desire to capture some kind of pedagogical benefit is false. Among other things, if UT were truly so motivated, it would be extremely concerned about the evidence that racial preferences are doing more harm than good for their intended beneficiaries. It would have made efforts to balance the pedagogical disadvantages of race-preferential admissions policies with diversity's speculative pedagogical advantages.

The evidence of disadvantage is especially persuasive in the area of science and engineering. Research indicates that the more universities lower their academic standards to admit aspiring science and engineering minority students, the *fewer* successful minority science and engineering majors will be produced system-wide. If UT were interested in increasing the number of African-American, Hispanic and American-Indian science and engineering majors on campus, it would, for example, be primarily targeting students whose academic credentials put them toward the middle or upper portion of UT's class. Many such students are currently attending or considering attending schools with even higher average academic credentials than UT's – like the Massachusetts Institute of Technology – where they needed preferences to gain admission. UT would explain to these students that their chances of success in science and engineering are greater in Austin than at MIT. That UT is not doing this speaks volumes.

UT's policy has more to do with indulging the tastes of legislators, accreditors, donors, students and others for what they superficially regard as social justice than it does with pedagogy. All of these actors want to think of themselves as benefitting minority students, but it appears none wants to give the means they are employing much thought. UT's policy cannot be said to be narrowly tailored to promote pedagogical goals.

If UT were a corporation subject to federal securities laws for its admissions policies, its failure to

adjust its policies to take account of the evidence of mismatch (or to at least warn applicants for admission of its unwillingness to do so and the resulting need for caution on the part of applicants) might be considered actionable fraud. The obvious lack of fit between UT's actual admissions policy and its purported compelling purpose should be treated with at least as much seriousness.

ARGUMENT

UT HAS NOT CARRIED ITS BURDEN OF PROOF TO SHOW THAT ITS ADMISSIONS POLICY IS NARROWLY TAILORED TO REAP THE EDUCATIONAL BENEFITS OF A DIVERSE STUDENT BODY FOR ALL ITS STUDENTS.

I. The Narrow Tailoring Component to Strict Scrutiny Helps Smoke Out Defendants Whose Appeal to a Compelling Purpose Is Insincere.

The purpose of the narrow tailoring part of the traditional strict scrutiny test is twofold. First, it ensures that only racial discrimination truly necessary to achieve defendant's avowed compelling purpose is permitted. Second, it provides an objective test for ensuring that defendant's avowed purpose is its *actual* purpose. If the policy is not narrowly tailored to serve the supposed compelling purpose, there is an

excellent chance other purposes are driving defendant's discriminatory conduct.

The burden of proof is on the defendant. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 (1989). *See also Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992) ("the burden is on defendants to show affirmatively that their restriction is narrowly tailored . . . ").

Race-preferential admissions policies are no exception to the rule that it is usually unwise to take the justifications offered for race discrimination at face value. Lurking beneath the pretext of concern for the educational value of diversity is often one or more of the motives explicitly rejected by Justice Powell in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-10 (1978) (Opinion of Powell, J.) (rejecting, inter alia, past societal discrimination and a desire to increase the number of minority professionals as justifications for race-preferential admissions); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (also rejecting past societal discrimination as a justification); *see generally* Brian Fitzpatrick, *The Diversity Lie*, 27 Harv. J.L. & Pub. Pol'y 385 (2003) (pointing out incompatibilities between diversity in theory and race-preferential admissions in practice).

Some academics have been candid about this. The year after *Bakke*, Columbia University law professor Kent Greenawalt, a skeptic of race-preferential admissions, declared, "I have yet to find a professional academic who believes the primary motivation

for preferential admission has been to promote diversity in the student body for the better education of all the students. . . ." Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 Cal. L. Rev. 87, 122 (1979).

Similarly, Harvard law professor Alan Dershowitz wrote:

> The raison d'être for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of "diversity" demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals.

Alan Dershowitz, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 Cardozo L. Rev. 379, 407 (1979).

More recently, Harvard law professor Randall Kennedy, an affirmative action proponent, stated:

> Let's be honest: Many who defend affirmative action for the sake of "diversity" are actually motivated by a concern that is considerably more compelling. They are not so much animated by a commitment to what is, after all, only a contingent, pedagogical hypothesis. Rather, they are animated by a commitment to social justice.

Randall Kennedy, *Affirmative Reaction*, Am. Prospect (March 1, 2003); *see also* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y

Rev. 1, 34 (2002) ("[M]any of affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds."); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 471-72 (1997) ("The purpose of affirmative action is to bring into our nation's institutions more blacks, more Hispanics, more Native Americans, more women, sometimes more Asians, and so on – period. Pleading diversity of backgrounds merely invites heightened scrutiny into the true objectives behind affirmative action."); Owen Fiss, *Affirmative Action as a Strategy of Justice*, 17 Philosophy & Pub. Pol'y 37 (1997) ("[T]wo defenses of affirmative action – diversity and compensatory justice – emerged in the fierce struggles of the 1970s and are standard today, but I see them as simply rationalizations created to appeal to the broadest constituency. . . . In my opinion, affirmative action should be seen as a means that seeks to eradicate caste structure by altering the social standing of our country's most subordinated group."); Daniel Golden, *Some Backers of Racial Preferences Take Diversity Rationale Further*, Wall St. J., June 14, 2003 (quoting former UT law professor Samuel Issacharoff: "'The commitment to diversity is not real. None of these universities has an affirmative-action program for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint.'").

If courts wish to identify the motives for race-preferential admissions, they should look beyond the

diversity rationale. Professor Erwin Chemerinsky, for example, has identified past discrimination as the "most frequently identified objective for affirmative action." Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 Ohio N.U. L. Rev. 1159, 1161 (1996). Others have cited other arguments that are unlikely to win judicial approval. *See, e.g.*, James D. Anderson, *Past Discrimination and Diversity: A Historic Context for Understanding Race and Affirmative Action*, 76 J. Negro Educ. 204 (2007); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 Cal. L. Rev. 683 (2004); Andrew Valls, *The Libertarian Case for Affirmative Action*, 25 Soc. Theory & Prac. 299 (1999).

Some of the most important reasons for these policies are quite mundane. For example, pressure from state government plays an important role. More than twenty-three percent of medical school and fifteen percent of law school admissions officers report that they have felt "significant" or "some" pressure to engage in affirmative action from state and local governments. Susan Welch & John Gruhl, *Affirmative Action and Minority Enrollments in Medical and Law Schools* 80, Table 3.3 (1998) (*"Welch-Gruhl"*).

Such pressure is hardly surprising given the legislature's role in setting university budgets. Former University of California Regent Ward Connerly authored the University of California Regents' policies (SP-1 and SP-2) ending race-preferential admissions there and chaired the campaign to pass

Proposition 209, which amended the California Constitution to prohibit race, gender, and national origin preferences in public contracting, education and employment. He described former University of California President Jack Peltason's stated reasons for opposing SP-1 and SP-2 this way:

> "Jack said, 'look we got a legislature to deal with that's really, that really has yes or no over our budget.' The code for everything that he was saying is that it's a Democratically controlled legislature. Willie Brown was the speaker and John Vasconcellos was chairing the Budget Committee, and John took a real interest in the University. So Jack's concerns were that, 'God, we're going to run into a buzz saw here,' and looking out for the best interests of the University, don't rock the boat."

Donald E. Heller, The States and Public Higher Education Policy: Affordability, Access, and Accountability 145 (2001) (quoting Ward Connerly). *See also* Jon Offredo & Jonathan Starkey, *NAACP, State Lawmakers: UD is Lacking in Diversity*, The News Journal, Feb. 10, 2015 ("Delaware's flagship university is facing new questions about a lack of diversity on campus, with students, state lawmakers and civil rights leaders calling on the University of Delaware to do more to recruit and retain black students.").

State universities like UT are more likely to feel that pressure than private universities. Thirty-eight Texas state legislators filed an amicus brief in *Fisher*

I, showing that legislative interest in UT's race-preferential admissions runs high. After reciting data on the racial composition of Texas, the brief states that the "Constitution simply does not require government officials to ignore the demographic realities. . . ." Brief *Amici Curiae* of 38 Current Members of the Texas State Senate and House of Representatives in Support of Respondents, *Fisher I* (No. 11-345) at 29 (filed Aug. 13, 2012). Their point appears to be that a state must be permitted to ensure that government benefits are distributed among racial groups in proportion to the population. In that, they are wrong. The Constitution does not permit the allocation of benefits on the basis of such "realities."

The federal government is also a major influence. Some schools report threats of legal action and threats to withhold funds; others report that the need to fill out federal paperwork effectively pressures them to engage in affirmative action. *Welch-Gruhl* at 80, Table 3.3. But as is often the case with the federal government's policies, it is the carrots rather than the sticks that have the most profound effects. Former University of California at Santa Cruz dean John M. Ellis, now an opponent of race-preferential admissions, candidly has admitted that, as graduate school dean during the 1970s, he started his school down the wrong road in order to qualify for federal monies:

> [At] the beginning of my terms as Graduate Dean at UCSC we had as yet no affirmative action program for graduate student admissions. And so when my office chief-of-staff got

> wind of a soon-to-be announced federal program of grants to campuses to provide fellowships for minority and women graduate students, we both had the same thought: of course we'd like more money to support our graduate students – but mainly we want more money, whatever it may be earmarked for.

John M. Ellis, *Starting Down the Slippery Slope* 2-3 (2015), available at http://www.newamericancivilrightsproject.org/wp-content/uploads/2015/07/A-Deans-Experience-with-Affirmative-Action.pdf. Ellis describes how he came to regret his decision to pursue these federal funds:

> "[W]hen it began, affirmative action seemed so modest and circumscribed, so limited in scope and so well-intended that it was impossible to imagine the damage it would do."

Id. at 1, 9 (discussing the "human cost" to supposed beneficiaries of preferential treatment who failed in their quest for a graduate degree). *See also* Public Health Service Act, Title VII, §736, 42 U.S.C. §293 (2011) (funding Centers of Excellence ("COE") programs in health professions education). HHS allocates funds appropriated for COE to schools of medicine, dentistry, pharmacy, and graduate programs in behavioral or mental health in part on the basis of whether those schools "have a significant number of URM [under-represented minority] students enrolled. . . .").

Private foundations and alumni donors have an effect, too, by offering carrots to institutions to

increase race preferences. *See, e.g.*, Daryl G. Smith, et al., *Building Capacity: A Study of the Impact of the James Irvine Foundation Campus Diversity Initiative* (May 2006) (discussing a $29 million effort to assist California colleges and universities with strategically improving campus diversity); *Briefing Room: Commitment to Diversity Leads to Gift*, Apr. 5, 2012 (announcing gift by alumnus to Ohio State University).[3]

Then there are the students groups who demand more diversity – usually in a civil manner, but sometimes not. In 2011, for example, at the University of Wisconsin, a student mob, egged on by the University's Vice Provost for Diversity and Climate, overpowered hotel staff, knocking some to the floor, to interrupt a press conference at which the speaker was critical of race-based admissions policies. *See*

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[3] Some of the earliest affirmative action programs were promoted and financed by the Rockefeller Foundation. They emphasized recruiting inner city students rather than the minority students with the best academic records. *See* Linda Chavez, *An Unlikely Conservative: The Transformation of an Ex-Liberal* 69-86 (2002); Donald Alexander Downs, Cornell '69: *Liberalism and the Crisis of the American University* 46-67 (1999); Thomas Sowell, *Black Education: Myths and Tragedies* 129-70 (1972). It was the spectacular failure of these programs that led to modern race-preferential admissions policies, which emphasize admitting the "best" African-American or the "best" member of another under-represented minority, regardless of whether that student is the son of dishwasher or the son of a neurologist.

Peter Wood, *Mobbing for Preferences*, Chron. Higher Educ., Sept. 22, 2011.[4]

Some universities practice discrimination in admissions because their federally-appointed accrediting authorities require it. *See* Brief *Amici Curiae* of the California Association of Scholars, et al. in Support of the Petitioner, *Fisher I* (No. 11-345) (filed Oct. 19, 2011) (arguing that admissions policies adopted in whole or in part to appease accreditors or funding sources are not protected by deference as applied in *Grutter v. Bollinger*, 539 U.S. 306 (2003); Margaret Jackson, *University of Colorado Medical School Heals Diversity Gap*, Denver Post, Apr. 21, 2012 ("The university has made a concerted effort to improve diversity among its students since its accrediting

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[4] *See also Editorial, From the Daily: Embarrassment*, The Michigan Daily, Oct. 31, 2006 (condemning the tactics of the Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Fight for Equality by Any Means Necessary ("BAMN") as "alienating and inflammatory," including "pull[ing] more than 1,000 middle and high school students out of class to bus them in for the rally," some of whom engaged in "spitting and yelling" at opponents); Associated Press, *Election Board Fails to Put Affirmative Action Issue on Ballot*, The Michigan Daily, Dec. 14, 2005 (describing crowd of 250 high school students, brought by BAMN, who overturned a table at a public meeting of the Board of State Canvassers while surging toward the board members and chanting "They say Jim Crow, we say hell no!"). These tactics were not unique to the initiative context. *See* Jordan Schrader, *BAMN Defends Purpose*, The Michigan Daily, Feb. 11, 2002 (reporting tactics in connection with the litigation in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

body – the Liaison Committee on Medical Education – cited the school for 'noncompliance' in 2010, when just 106 of 614 students were minorities."); Gail Heriot, *The ABA's "Diversity" Diktat*, Wall St. J., Apr. 28, 2008 (chronicling the ABA's demands for race-preferential admissions for the sometimes-resistant law schools it accredits); James T. Hammond, *Charleston School of Law: New School Fails to Win Accreditation So Students Can Take Bar*, The State (Columbia, S.C.), Jul. 12, 2006.

Admissions policies, like many statutes and regulations, are like sausages. The less one knows about how they are made, the easier it is to respect their results. It is rare for them to be narrowly tailored for any particular purpose. They are driven by practical politics, not pedagogy.

It is unlikely that the Court (in *Grutter v. Bollinger*, 539 U.S. 306 (2003)) would have approved the university's race-preferential admissions policy if its explanation for it had been: "This is what our state legislature wants, and it is our judgment that without the legislature's support, our educational mission will suffer."; or "The Mellon Foundation is very enthusiastic about race-preferential admissions, and that's where the money is." Yet explanations like these are more consistent with UT's actual policy than is any effort to capture diversity's educational benefits for all its students.

What motivates legislators, accreditors, donors and student groups that press for race-preferential admissions is impossible to state with certainty. It is

unlikely to be pedagogy, since they rarely take an interest in that subject. More likely, they are trying to promote one of the aims that Justice Powell rejected in *Bakke* as unconstitutional or to help minorities without giving much thought to how their goal can be accomplished.

The pretext issue was not argued directly in *Grutter* or *Gratz v. Bollinger*, 539 U.S. 244 (2003). It is likely those plaintiffs wished for a decisive holding that would resolve the constitutionality of race-preferential admissions policies once and for all, rather than require victims to litigate the issue on a college-by-college basis. Since the latter sort of litigation could raise questions of fact for trial, it would require long-term financing that few students applying for admission to college can muster.

Pretext, however, may also be brought up indirectly through the subtler mechanism of the narrow tailoring inquiry. This was done in *Grutter* and *Gratz*, although it was secondary to plaintiffs' primary argument that the University of Michigan had no compelling purpose that could justify race discrimination.[5] In *Gratz*, the argument was crucial. In *Grutter*, it seems to have gotten lost in the shuffle.

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[5] The Court acknowledged that this argument in *Gratz* was secondary and alternative; first and foremost was petitioners' argument that the educational benefits of diversity are not sufficient to classify as "compelling." This argument was foreclosed by *Grutter*, 539 U.S. at 268-69.

II. UT Must Narrowly Tailor Its Race-Preferential Policies to Take Account of Both the Educational Advantages of Diversity and the Educational Disadvantages of the Gaps in Academic Credentials Created by Its Actions.

When a university engages in race-preferential policies to please internal and external constituencies – from accreditors to donors to students to the legislature – its leaders probably do not feel the need to think deeply about the educational consequences. They have accomplished their goal when accreditors renew the university's accreditation, when the legislature approves their budget, when private foundations and alumni donors make generous gifts, or when student groups find something else to protest.

On the other hand, if they are attempting to reap diversity's pedagogical benefits one would expect that they would be carefully balancing those benefits with the pedagogical disadvantages of the gaps in academic credentials that are thought to be necessary to achieve that diversity. If it were all about pedagogy, admissions policies would look very different from how they look today.

Both Justice Powell in *Bakke* and the *Gratz* Court rejected admissions policies that were not tailored in a way that demonstrates a true concern for conferring educational benefits on all students.

In *Bakke*, Powell took the position that it is permissible for a school to discriminate in order to get

diversity's educational advantages for all its students. But he took the further position that University of California, Davis Medical School could not do so by reserving a set number of slots for racial minorities. In Powell's view, the school could hardly claim that it was inspired by a desire to improve its students' education through diversity under such circumstances. In any given year, the school had no way of knowing *ex ante* how great a credentials gap these reserved seats for racial diversity would necessitate relative to the size of the credentials gap needed to emphasize other kinds of diversity. One can't know the trade-offs until one has examined the applicant pool that year.

In essence, Powell called the medical school's bluff. If it were really concerned about capturing the educational benefits of diversity for all its students, it would have set up an admissions policy that gave it flexibility to substitute non-racial varieties of diversity on those occasions when racial diversity achieved through preferential treatment threatened to cause greater pedagogical disadvantages.

That is precisely what is at issue in this case. If UT were really concerned about capturing the educational benefits of diversity for all its students, it would be substituting non-racial varieties of diversity (*e.g.*, socio-economic status, religion, immigrant status, political ideology) in view of the considerable evidence (discussed *infra* at Part III) that gaps in academic credentials are imposing serious educational disadvantages on its minority students. It would be especially careful to do this in the areas of

science and engineering. The fact that UT is oblivious to the special problems associated with science and engineering proves that UT is not serious. If UT were serious about pedagogy, there is no chance that it would spotlight science and engineering as the area in which the need for diversity is most immediately pressing and hence the need for outright racial preferences is most justified. The opposite is true: If educational values were on its mind, it would be especially careful to ensure that under-represented minorities who wish to major in science and engineering are not concentrated towards the bottom of the class.

Gratz is similar to *Bakke*. In it, the Court concluded that "the University's use of race in its current freshman admissions policy [was] not narrowly tailored to achieve respondents' ***asserted*** compelling interest in diversity." *Gratz*, 539 U.S. at 275 (emphasis added). The University of Michigan's College of Literature, Science, and the Arts had been adding twenty points to the "selection index" of all applicants from certain under-represented races and ethnicities – a sufficient number to ensure the admission of "virtually every minimally qualified underrepresented minority applicant." The majority held such fixed numerical preferences to be proof of lack of narrow tailoring.

Commentators on both sides mocked the Court for concluding that race-preferential admissions are constitutional only if universities are careful not to be obvious about them. But it is unlikely that procedural

flexibility for its own sake was what influenced *Gratz's* swing Justices. A better read of *Gratz* is that the Court concluded that the college was likely not motivated by a genuine desire to capture the educational benefits of diversity. If the college had been, it would have been more mindful of the trade-offs between racial diversity and other dimensions of diversity. A university that was truly concerned about improving education through diversity would have been more cautious.

In *Bakke*, it was a fixed number of seats; in *Gratz* it was a fixed number of points. In both cases, the real point was that the defendant's actions belied its assertion that it was driven by concerns over pedagogy.

III. The Educational Disadvantages of Obtaining Diversity Through Race-Preferential Admissions Policies Are Too Great to Be Ignored by a University that Purports to Be Driven by a Desire to Confer Educational Benefits on Its Students.

As Justice Thomas discussed in his *Fisher I* concurrence, despite the good intentions of those who originated these policies, they apparently do not work. *Fisher I*, 133 S.Ct. at 2422-32 (Thomas, J., concurring). If the mounting empirical evidence is correct – as we believe it is – the nation now has fewer African-American physicians, scientists, and engineers than it would have had using race-neutral methods. It probably has fewer college professors and

lawyers too. *See* Gail Heriot, *The Sad Irony of Affirmative Action*, 14 Nat'l Aff. 78 (2013) ("*Sad Irony*").

No fair-minded person would support race-preferential admissions as it is practiced today if he or she took the time to examine carefully and digest the research, most of which has gone completely unrebutted, especially in the area of science and engineering. Minority students are not public utilities. If they are worse off on account of race-preferential admissions, then race-preferential admissions are not narrowly tailored to achieve the goal of a better education for *all* through diversity. A policy that is backfiring cannot be narrowly tailored to achieve its goal.

This is not what university administrators want to hear, most of whom are under intense pressure both internally and externally to continue that policy. But as UCLA law professor Richard Sander and legal journalist Stuart Taylor Jr. discuss in their 2012 book, *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* ("*Mismatch*"), it is getting increasingly difficult for those administrators to deny the evidence.

Sadly, even if an individual university like UT were willing to admit the backfire, it would be difficult for it to do much about it individually. Universities are caught in a collective-action problem. If just one selective school goes cold turkey on race-preferential admissions, it will enroll few (and in

some cases no) members of under-represented minorities. Such a school is unlikely to be willing to go it alone. Even if it wanted to, state legislators would likely object, its federally appointed accrediting agency would refuse re-accreditation, and some of its foundation grants would likely dry up. No wonder UT has not expended much effort looking into whether the advantages of race-preferential admissions outweigh its disadvantages or even into whether reducing preferences could improve educational outcomes. UT administrators are on a merry-go-round that they cannot get off; there is not much point in their getting philosophical about whether that merry-go-round should or should not exist. It will take court intervention to force them to take account of the evidence.

Here's the crux of the problem: One inevitable consequence of widespread race-preferential policies is that minority students tend to enroll in schools where their entering academic credentials put them toward the bottom of the class. While academically gifted under-represented minority students are hardly a rarity, there are not enough to satisfy demand at the very top schools. When the most prestigious schools relax their admissions policies in order to admit more minority students, they start a chain reaction, resulting in a substantial credentials gap at nearly all selective schools.

All of this has the predictable effect of lowering the college or professional school grades the average

non-Asian minority student earns.[6] And the reason is simple: While some students will outperform their entering credentials, just as some students will under-perform theirs, most students perform in the general range that their entering credentials suggest. This is fundamental.

The strongest evidence on why the credentials gap is bad comes from science and engineering.[7]

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[6] The average African-American first-year law student has a grade-point average in the bottom 10% of his or her class. *See* Richard Sander, *A Systemic Analysis of Affirmative Action in Law Schools*, 57 Stan. L. Rev. 367, 427-28 (2004). While undergraduate GPAs for affirmative action beneficiaries are not quite as disappointing, that is in part because affirmative action beneficiaries tend to shy away from subjects like science and engineering, which are graded on a tougher curve than other subjects. *See* Peter Arcidiacono, Esteban Aucejo & Ken Spenner, *What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GAP and Major Choice*, 1 IZA J. Lab. Econ. 5 (2012) ("*What Happens After Enrollment?*").

[7] For similar evidence that preference beneficiaries are less likely to become lawyers than their similarly-credentialed peers who attended less competitive schools and hence got better grades, *see* Richard Sander, *A Systemic Analysis of Affirmative Action in Law Schools*, 57 Stan. L. Rev. 367 (2004); *see also* Richard Sander & Jane Bambauer, *The Secret of My Success: How Status, Eliteness and School Performance Shape Legal Careers*, 9 J. Empirical Legal Stud. 893 (2012). While some have argued that, owing to shortcomings in the available data, Sander's finding should not be taken as the last word on law school affirmative action, *see, e.g.*, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807 (2005), it is notable that some of the same people who originally argued that more research was necessary then argued successfully that Sander's team should be denied

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Contrary to what some expect, college-bound African-American and Hispanic students are just as likely to be interested in majoring in science and engineering as white students. Indeed, empirical research shows that they are a little more so. *See, e.g.*, Alexander Astin & Helen Astin, *Undergraduate Science Education: The Impact of Different College Environments on the Educational Pipeline in the Sciences* 3-9, Table 3.5 (1992). But these are more-difficult-than-average majors. Many students abandon them. Significantly, African-American and Hispanic students jump ship at much higher rates than whites. A recent study at Duke University, for example, found that approximately fifty-four percent of black males switched out of such majors, whereas less than eight percent of white males did.[8]

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access to California Bar data for that research. *See Mismatch* at 233-44.

Meanwhile, research is starting to trickle in that supports Sander's conclusion. *See* Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools?*, 10 J. Empirical Legal Stud. 171 (2013). A misplaced criticism of Sander's work has been withdrawn. *See* Katharine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Students? A Correction, a Lesson and an Update*, 105 Nw. U. L. Rev. 791 (2011).

[8] *See What Happens After Enrollment?*, *supra* note 6 at 3. These authors also dispelled the common belief that affirmative action beneficiaries "catch up" after their freshman year with their better-credentialed classmates. What happened instead was that many transferred to majors where the academic competition is less intense and where students are graded on a more

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It is not surprising that students with lower entering academic credentials disproportionately give up on their ambition to get a science or engineering degree more often than those with higher academic credentials. What some do find unexpected is this: Three in-depth studies have demonstrated that ***part of the effect is relative***. An aspiring science or engineering major who attends a school where her entering academic credentials put her in the middle or the top of her class is more likely to persevere and ultimately succeed than an *otherwise identical student* attending a more elite school where those same credentials place her toward the bottom of the class. Put differently, affirmative action is a hindrance, not a help, for preference beneficiaries who aspire to earn degrees in science and engineering. Rogers Elliott et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Educ. 681 (1996) (*"Elliott"*); Frederick Smyth & John McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 4 Res. Higher Educ. 353 (2004) (*"Smyth & McArdle"*); Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science*

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lenient curve. Their GPAs increased, but their standing relative to their peer group did not.

Graduates?, Working Paper (Draft July 2009) ("*Sander & Bolus*").[9]

Each of these studies used a different database and methodology. Yet all came to the same conclusion: *To our knowledge, no one has attempted to rebut any of these studies, much less all three.* Yet colleges and universities across the country ignore them.

In the first of these studies – the article by Dartmouth psychologist Rogers Elliott and his co-authors – the single most important cause for minority attrition from science at the eleven selective institutions they studied was the "relatively low preparation of black aspirants to science in these schools." *Elliott* at 700. The authors were careful to put the emphasis on "relatively." It was not just entering credentials

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[9] This basic insight is not new. *See* James Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 Am. J. Socio. 17 (1966). Writing outside the affirmative action context, Davis found that college grades were more strongly correlated with the decision to enter a high-prestige career than was the selectivity of the institution. In some cases at least, the added self-confidence one enjoys as a result of being the big frog in the small frog pond appeared to outweigh whatever advantages an elite education in a larger, more glamorous frog pond can offer. Davis therefore offered the following advice: "Counselors and parents might well consider the drawbacks as well as the advantages of sending a boy to a 'fine' college, if, when doing so, it is fairly certain he will end up in the bottom ranks of his graduating class." *Id.* at 30-31. As a result of race-preferential admissions policies, two generations of under-represented minority students have now disproportionately had the experience of being the small frog in a highly competitive pond.

demonstrating highly developed ability at science that mattered but comparatively high credentials. A student who attended a school at which his math SAT score was in the top third of this class was more likely to follow through with an ambition to earn a degree in science or engineering than was a student with the same score who attended a school at which his score was in the bottom third.

According to *Elliott*, a student with a math SAT score of 580 "who wants to be in science will be three or four times more likely to persist at [the two least competitive schools of the eleven prestigious schools studied] . . . than at [the two most competitive schools]. . . ." *Id.* at 702.

The extraordinary record of Historically Black Colleges and Universities ("HBCUs") was a second source of evidence cited in *Elliott*. With only twenty percent of total black enrollment, these schools were producing forty percent of the black students graduating with natural science degrees, according to the National Science Foundation. Those same students were frequently going on to earn Ph.D.s from non-HBCUs. The National Science Foundation reported, for example, that thirty-six percent of the blacks who earned an engineering doctorate between 1986 and 1988 received their undergraduate degree from an HBCU.[10] *Id.* at 700. *See* Elizabeth Culotta, *Black*

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[10] More recent figures are available in *Fisher I*, 133 S. Ct. at 2422, 2432 n. 5 (Thomas, J., concurring).

Colleges Cultivate Scientists, 258 Science 1216 (Nov. 13, 1992) ("*Culotta*").

Why have HBCUs been so successful? The *Elliott* authors believed that unlike at mainstream institutions, African-American students at HBCUs were not grouped at the bottom of the class. Roughly half were in the top half of the class. Academic mismatch was not an issue.[11]

Eight years later, University of Virginia psychologists Frederick Smyth and John McArdle used a different methodology and database. But their findings confirmed *Elliott's*, and the effects were not subtle. In *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admissions Policy and College Choice*, Smyth and McArdle found that among a sample of underrepresented minority students at twenty-three universities who intended to major in science, mathematics, or engineering, forty-five percent more of the women and thirty-five percent more of the men would have succeeded in attaining their goals if they had attended schools where their entering credentials had been about average. *Smyth & McArdle* at 373.

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[11] One HBCU faculty member – North Carolina Central University's Dr. Walter Patillo, Jr. – vented his frustrations in 1992: "The way we see it, the majority schools are wasting large numbers of good students. They have black students with admissions statistics [that are] very high, tops. But these students wind up majoring in sociology or recreation or get wiped out altogether." *Culotta* at 1218.

Those figures, upon reflection, are stunning. If, in just the time it would take a high school senior to graduate from college with a degree in science or engineering, we could add as success stories 45% more women and 35% more men at these schools, that would be a breakthrough of epic proportions. A tenth would at least be a step in the right direction.

The third such study – by UCLA law professor Richard Sander and UCLA statistician Roger Bolus – pulled data from nine University of California campuses. The authors came to a similar conclusion. "Minority attrition in science is a very real problem," they wrote, "and the evidence in this paper suggests that 'negative mismatch' probably plays a role in it." Their multiple approaches to the data yielded consistent results:

> [S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers.

Sander & Bolus at 24.

Similar evidence shows that beneficiaries of race preferences are less likely to go on to graduate school and become college professors than underrepresented minority students who attend schools where their entering credentials match those of the typical student at their school. Stephen Cole & Elinor

Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* (2003) ("*Cole & Barber*"). Authored by a professor of sociology at the State University of New York at Stony Brook (Stephen Cole) and a research associate in the provost's office at Columbia University (the late Elinor Barber), that study's purpose was to advise the Ivy League and other colleges and universities on how to increase the racial and ethnic diversity of their faculties. The original research for the project – which consisted of individual interviews with students, focus groups, and many thousands of questionnaires – was heavily underwritten by the Mellon Foundation, a strong supporter of race-preferential admissions policies.

Cole and Barber's study easily could have become just one more among many reports on diversity. It could have recited the usual clichés: Colleges and universities should make greater efforts to make minorities feel welcome; they should celebrate diversity; they should go the extra mile. Universities could wallpaper their administrative offices with such reports.

Instead, the authors really tried to discover why so few high-achieving African Americans choose to go to graduate school with an eye to becoming college and university professors. Unlike many of their predecessors who have weighed in on that question, they declined to ignore the problem of affirmative action-induced low grades. As the authors put it:

> [Many of the best-prepared African-American students] are admitted to schools where, on average, white students' scores are substantially higher, exceeding those of African Americans by about 200 points or more. Not surprisingly, in this kind of competitive situation, African Americans get relatively low grades. It is a fact that in virtually all selective schools (colleges, law schools, medical schools, etc.) where racial preferences in admission is practiced, the majority of African-American students end up in the lower quarter of their class. . . .

Cole & Barber at 124.

As Cole and Barber acknowledge, that leads to problems:

> It is not at all surprising that academic performance in college should turn out to be an important influence on the decision to select academia as a career. If a student is not academically successful and has not received rewards for his or her academic performance, it would make little sense for that student to think of spending the rest of his or her life in a job where "being good in school" is a prerequisite.

Id. at 30.

No surprise there: Young people tend to go into fields in which they perceive they will do well. Weak swimmers do not sign up for training as lifeguards, and the kind of person who perpetually burns the

toast does not seek training as a professional chef. At college, students get a sense of how good they would likely be as college professors from their grades. Students who are not toward the top of the class are less likely to think of academia as the best place to apply their talents. Cole and Barber, unlike their predecessors, were willing to say so.

Rather than recommend staying the course on affirmative action, Cole and Barber argued for a change in direction. Finding that African-American "students who attend less selective schools are more likely than those who attend selective schools to persist with a freshman interest in academia," they advised that:

> Instead of recommending that minority students go to the most prestigious school they can get into, high school guidance counselors should recommend that each student go to a school where he or she is likely to do well academically. An HBCU may be such a school. Guidance counselors, in short, should try to reduce some of the lack of fit between the level of academic preparation of minority students and the schools where they enroll.

Cole & Barber at 249.

Soon after publication, the Chronicle of Higher Education reported that the Mellon Foundation was "trying to distance itself" from the book's findings.

Unlike similar projects with Mellon funding,[12] this one did not receive a publicity push from the foundation. Dr. Cole told the Chronicle that there was "no chance" that he would receive money again from Mellon. "And I don't care," he said. "I was trained at a time before social science became so politicized." "I believe that social science should be objective and value-free, and you should design a study to answer a question and whatever the answer is, that's what it is." Robin Wilson, *The Unintended Consequences of Affirmative Action*, Chron. Higher Ed. 10 (Jan. 31, 2003).[13]

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[12] For a discussion of the considerable publicity that accompanied a pro-racial preference study financed by the Mellon Foundation and the reasons that study goes further towards proving mismatch rather than refuting it, *see Sad Irony* at 88-91 (discussing William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998)).

[13] Amici anticipate that UT or its supporting amici curiae will bring up the theory of "stereotype threat" in their defense of UT's policies. *See, e.g.*, Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. Person. & Soc. Psych. 797 (1995). For Amici's discussion of why race-preferential admissions policies cannot be justified as a response to stereotype threat, *see* Brief *Amici Curiae* of Gail Heriot, Peter Kirsanow & Todd Gaziano, Members of the United States Commission on Civil Rights in Support of Petitioner, *Fisher I* (No. 11-345) at 20-24 (filed May 29, 2012).

IV. It Is Clear that UT Has Not Narrowly Tailored Its Admissions Policy to Secure the Educational Benefits of Diversity for All Students, Since It Is Indifferent to the Likelihood that Its Choices Are Imposing Educational Disadvantages on Minority Students.

There is a profound disconnect between UT's purported reason for its policy and the policy itself. Among many other things, if UT were really concerned about the educational advantages produced by diversity, it would be concerned over the evidence that the credentials gaps necessary to obtain that diversity are creating educational disadvantages for its minority students.

At a minimum, it would not be arguing that it needed to create racial diversity in each and every major and program (including science majors and programs). Science is science. There is no such thing as an African-American approach to chemistry or a Swedish-American approach to physics. On the other hand, race-preferential admissions policies across the nation are *causing* the lack of racial diversity in science and engineering departments. They are not the solution. A race-preferential admissions policy that was narrowly tailored to capture the educational benefits of diversity would certainly avoid giving preferential treatment to aspiring minority science and engineering students without informing them in clear terms of the risk they are undertaking.

Given that UT's policy has resulted in twenty percent Hispanic students and six percent African-American students, it is more plausible to believe that it is aimed at purposes that Justice Powell has already rejected as unconstitutional – such as compensating for past societal discrimination – or at just dealing with day-to-day pressures from legislators, accreditors, donors and students for UT to reflect the state's demographics. UT's twenty percent for Hispanic students is clearly beyond anything that could be called "critical mass" purposes for diversity's sake. A slightly lower percentage of UT's student body is Asian-American, but UT does not grant them preferential treatment in admissions.

Amici do not believe that all or even most university administrators who support race-preferential admissions are ill-motivated (although those whose jobs depend on these policies' continuation can have very poor judgment on the issue). Rather, some are simply caught in the past. They have devoted their lives to promoting race-preferential admissions as (an unconstitutional) means of remedying past societal discrimination or simply in an effort to increase the number of minority college graduates and professionals; they are not prepared to consider the possibility of error. Many more are caught up in the present – the day-to-day business of reporting to the state legislature, qualifying for federal and foundation grants, romancing potential donors, marketing the school to potential students, ensuring that the university's rank in *US News & World Report* magazine is high,

and appeasing interests groups. As we all do sometimes, they have lost sight of any true goal, constitutional or otherwise.

The Constitution, however, does not permit racial discrimination inspired by practical politics, whether its advocates mean well or not. Nor can a policy that emerges from such considerations be said to be narrowly tailored for capturing diversity's educational benefits.

In 2014, Amici sent letters to seventy-six colleges and universities drawing their attention to mismatch research and urging them to tailor their admissions policies to take account of it. Only one school responded (with a brief acknowledgment).

Later, at Amici's urging, the Center for Equal Opportunity, a 501(c)(3) specializing in civil rights issues, made requests to twenty-two state universities, pursuant to their respective state freedom of information acts, for documents that would reflect each school's consideration of the mismatch literature in developing its admissions policy. Thus far, eleven have admitted outright they have no such documents. Two provided documents that did not reflect the consideration of mismatch in developing their admissions policy. The rest declined to or failed to respond. In sum, none of the twenty-two has said that it considered the problem of mismatch in its admissions policy.

Colleges and universities will not focus on narrowly tailoring their policies to fit the evidence of the

pedagogical advantages (and disadvantages) of racial preferences unless this Court requires them to. The stakes are high.

V. The Strict Scrutiny Standard as Elaborated Upon in *Fisher I* Requires Courts to Perform a Difficult Task That Thus Far the Fifth Circuit Has Declined to Do.

It is understandable why courts would prefer not to wade into complex empirical literature to determine whether UT's admissions policy is narrowly tailored to fit its alleged compelling purpose. Amici would prefer that courts not have to do so, too.

But there are only three possible general approaches to the problem of state-sponsored race discrimination. The Supreme Court in *Bakke*, *Gratz* and *Grutter*, as now clarified by *Fisher I*, chose the middle path, which will often require that courts engage in difficult analysis.

The other alternatives likely would not have. At one end of the spectrum is deference to the state actor's judgment as to both components of strict scrutiny. Amici submit that this is difficult to distinguish from capitulation to race discrimination. As Justice Thomas points out in his *Fisher I* concurrence, there is always an argument that race discrimination is in everyone's best interests. In *Brown v. Board of Education*, 347 U.S. 483 (1954), for example, Southern education experts contended that segregated schools facilitated all students' learning.

At the spectrum's other end is the robust version of strict scrutiny envisioned by Gerald Gunther in his justly famous phrase – "strict in theory but fatal in fact." Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972). Gunther's strict scrutiny would permit such non-controversial uses of race as allowing prison guards to separate prisoners temporarily by race during a prison yard race riot. But it would permit little else. This approach (which we believe would have been the better approach) would also spare the courts the need to wade into empirical literature.[14]

The combination of *Grutter*-deference on compelling interest and *Fisher I*'s requirement of tough-minded strict scrutiny on narrow tailoring does not spare the courts that need. The Fifth Circuit must conduct a searching inquiry into whether UT structured its policy as it would have if its alleged purpose were its actual purpose. That has not occurred here. If it had, the result would have favored the Petitioner.

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[14] *See* Gail Heriot, *Strict Scrutiny, Public Opinion and Racial Preferences on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 Harv. J. Legis. 217, 219 (2003). In this article, it is argued that courts should always defer to a public preference for race neutrality but should never defer to a public preference for race discrimination, no matter how strong that preference might be.

VI. Plaintiff Has Standing Based on an Unjust Enrichment Theory.

Defendant has argued Plaintiff lacks standing, because she cannot show she would have been admitted in the absence of its discriminatory policy. This argument misconstrues the theory of the case. This is in part an unjust enrichment case. The proper remedy is thus restitution. Put differently, Plaintiff wants her money back – an appropriate remedy when proof of damages is difficult, yet a legal wrong has been done. Suppose plaintiff had entered a lottery, but defendant had tossed out her entry because of her race. She could not prove she would have won. Indeed, she probably would not have. But she is nevertheless entitled to her money back. *See generally*, Douglas Laycock, *Restoring Restitution to the Canon*, 110 Mich. L. Rev. 929 (2012).

CONCLUSION

For the foregoing reasons, Amici urge that the decision of the U.S. Court of Appeals for the Fifth Circuit be reversed, that entry of summary judgment

for UT be vacated, and that summary judgment be entered for Abigail Noel Fisher.

Respectfully submitted,

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